Supreme Court, U.S.
FILED

03 333 JUL 14 2003

No.

In The
Supreme Court of the United States

LI YU,
Administrator of Deceased Wei Wu's Estate.
Petitioner,

v.

STATE OF TEXAS DEPARTMENT OF TRANSPORTATION;
CAROLINE A. HERRERA,
In Her Individual and Official Capacity;
KATHERINE HOLTZ,
In Her Individual and Official Capacity.

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

SUPPLEMENTARY APPENDICES

Li Yu, Petitioner
1514 SW. Wayne Avenue
Topeka, Kansas 66604
(785) 233-0237

TABLE OF SUPPLEMENTARY APPENDICES

Page

1. The Order of the United States District Court

   For the Western District of Texas

   Of January 7, 2002 c

2. The Order of the United States District Court

   For the Western District of Texas

   Of August 2, 2002 ..... j

C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

LI YU, ADMINISTRATOR OF THE ESTATE OF WEI Y. WU,
Plaintiff

"FILED"
Seal
JAN 07 2002

V.

No. A-01-CA-741 SS

TEXAS DEPARTMENT OF TRANSPORTATION, CAROLINE HERRERA, KATHERINE HOLTZ,
Defendants

ORDER

BE IT REMEMBERED that on the 7th day of January 2002, the Court reviewed the file in the above-styled cause, specifically Defendants Motion to Dismiss [#3], Plaintiff's Response [#5], and Defendants' Reply [#6]. Having considered the motion and responses, the case file as a whole and the applicable law, the Court enters the following opinion and order.

The Plaintiff, Li Yu, sues on behalf of the estate of Wei Y. Wu under the Americans with Disabilities Act ("ADA"), Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §1983, 42 U.S.C. §1985, and state tort law. Yu seeks a declaratory judgment, injunctive relief, monetary damages for lost income, pain and suffering, funeral costs and administrative expenses, punitive damages, and attorney's fees. In this motion, the Texas Department of Transportation ("TXDOT") and Caroline A. Herrera and Katherine L. Holtz, in their official capacities,[1] request dismissal of Yu's claims against them based on failure of jurisdiction and failure to state a claim upon which relief can be granted.

[1] This order does not apply to Yu's suit against Herrera and Holtz in their individual capacities. They have filed an answer to the complaint in their individual capacities.

Background

At the time of his death, Wei Yi Wu was employed as an engineer supervisor by TXDOT in the Materials and Testing Section, Construction Division, in Austin, Texas. *See* Complaint, ¶9. Defendants Herrera and Holtz were also TXDOT employees and Wu's supervisors. *See id.*, at ¶11-12. Yu was appointed administrator of Wu's estate by Probate Court of Travis County and sues on behalf of Wu's estate for events that took place between April 1999 and November 20, 1999. *See id.*, at ¶8. In her complaint, Yu alleged Herrera and Holtz discriminated against and harassed Wu because of his Chinese descent and his accent when speaking English. *See id.*, at ¶16-23. When Wu began suffering headaches and other symptoms from a cancerous brain tumor in August 1999, Herrera refused to accommodate his illness and harassed him further. *See id.*, at ¶24-28. Wu was diagnosed as having a brain tumor on November 3, 1999, and underwent surgery to remove the tumor on November 9. *See id.*, at ¶29-30. On November 18, he returned to work, and TXDOT Human Resources officials requested he continue taking sick leave. *See id.*, at ¶36-39. On November 19, Wu again returned to work, but Herrera and Holtz again escorted him home. *See id.*, at ¶40-43. Later that day, TXDOT employees allegedly escorted Wu to an appointment with his doctor about which he had no prior knowledge, and at that appointment obtained confidential medical information about Wu's condition from his doctor. *See id.*, at ¶44-46. On November 20, 1999, Wu committed suicide. *See id.*, at ¶47.

Analysis

I. Standard for Motion to Dismiss

TXDOT, Herrera and Holtz ("Defendants") move to dismiss Yu's complaint under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.[2] In

---

[2] Defendants also move to dismiss on behalf of the State of Texas. However, the State of Texas was not named as a defendant in Yu's complaint, despite Defendants' interpretation the style of the case, which reads "State of Texas-Department of Transportation." In the description of the parties in the complaint, Yu clearly names only TXDOT, Herrera, and Holtz. *See* Complaint, ¶ 10. This issues is, of course, immaterial as a lawsuit against TXDOT is in effect one against the State of Texas.

deciding whether to dismiss for failure to state a claim, "the district court must take the factual allegations of the complaint as true and resolve any ambiguities or doubts regarding the sufficiency of the claim in favor of the plaintiff." *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993). The Court should dismiss only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 78 S. Ct. 99, 102 (1957). The same standard is used to analyze a motion to dismiss for lack of subject matter jurisdiction. *See Benton v. U. S.*, 960 F.2d 19, 21 (5th Cir. 1992).

II. **ADA and Title VII Claims**

Yu sues Defendants on behalf of Wu's estate for disability and national origin discrimination under Title VII and the ADA. Under both statutes, a plaintiff must first exhaust her administrative remedies by filing a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") or the Texas Commission on Human Rights ("TCHR") before filing a lawsuit in federal court. *See* 42 U.S.C. §2000e-5; 42 U.S.C. §12117(a); *Dao v. Auchan Hypermarket*, 96 F.3d 787, 788-89 (5th Cir. 1996); *Cruce v. Brazosport Independent Sch. Dist.*, 703 F.2d 862, 863 (5th Cir. 1996). It is undisputed that neither Yu nor Wu filed a charge with the EEOC or TCHR. Yu contends a TCHR employee informed her it would not take a case for a deceased plaintiff. See Plaintiff's Response [#5], at 4. This limited inquiry does not qualify as exhaustion of administrative remedies.

The Fifth Circuit has held that failure to file a charge with the EEOC strips this Court of subject matter jurisdiction over a plaintiff's discrimination claim. See *Tolbert v. U.S.*, 916 F.2d 245, 247-48 (5th Cir. 1990). Because Yu did not exhaust her administrative remedies, this Court must dismiss her ADA and Title VII claims under Rule 12(b)(1) for failure of subject matter jurisdiction.[3]

---

[3] Even if Yu had exhausted her administrative remedies under the ADA, Defendants are immune from suit under the Eleventh Amendment. The Supreme Court recently held suits by state employees against a state in federal court to recover money damages for the state's failure to comply with the ADA are barred by the Eleventh Amendment. *See Board of Trustees of the University of Alabama v. Garrett*, 531 U. S. 356 (2001).

III. Section 1983 Claims

Yu claims Defendants violated Wu's constitutional rights, including his Fourteenth Amendment rights to liberty and due process and his right to privacy. Although Yu does not specify that she brings these constitutional claims under 42 U.S.C. §1983, that statute is the proper enforcement mechanism for constitutional claims against state officials acting under color of state law. Section 1983 does not create substantive rights; it merely provides a remedy for substantive rights protected under the Constitution and laws. *See Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985).

Defendants claim they are immune from suit under the Eleventh Amendment. The Eleventh Amendment divests federal courts of jurisdiction over suits against states and state agencies acting as an arm of the state. To determine if TXDOT is an arm of the state, the Court "must examine the particular entity in question and its powers and characteristics as created by state law to determine whether the suit is in reality a suit against the state itself." *Farias v. Bexar County Bd. of Trustees for Mental Health Mental Retardation Servs.*, 925 F.2d 866, 874 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 193 (1991). Other district courts in the Fifth Circuit have held TXDOT to be an arm of the state and, thus, immune from suit, and this Court agrees. *See Coburn v. Texas Dep't of Transp.*, 1997 WL 328009 (N.D. Tex. 1997); *Williams v. Texas Dep't of Transp.*, 1997 WL 53142 (N.D. Tex. 1997).

Because TXDOT is immune from suit, Herrera and Holtz are also immune from suit for actions taken in their official capacities. A suit against state officials acting in their official capacities is equivalent to a suit against the sovereign itself. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02 (1984). A plaintiff may only sue a state official in her official capacity for prospective injunctive relief. *See Ex Parte Young*, 209 U.S. 123 (1908). In her complaint, Yu requests "a preliminary and permanent injunction enjoining the TxDOT from discrimination and retaliation against the protected groups of people on any basis forbidden by the American ADA law and Title VII." Complaint, at ¶ 103(2). Defendants allege this request for injunctive relief does not qualify for the *Ex Parte Young* exception to Eleventh Amendment immunity because Yu does not allege

Wu suffers an ongoing violation of the law, since Wu died on November 20, 1999. *See e.g., Honig v. Doe*, 484 U.S. 305, 318-21 (1988); *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 n.3 (5th Cir. 1996) ("Jurisdiction over a plaintiff's claim for future relief is appropriate only if a reasonable likelihood exists that the *plaintiff* will again be subjected to the allegedly unconstitutional actions."). Because Wu is deceased and the case names no other plaintiff, the Court finds the request for injunctive relief is not sufficient to bypass Defendants' Eleventh Amendment immunity under the *Ex Parte Young* exception.

IV. Section 1985 Claims

Yu also claims Herrera and Holtz conspired to violate Wu's constitutional rights in violation of 42 U.S.C. §1985(1). Section 1985(1) provides an action for damages against persons who "conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States" or "induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed." 42 U.S.C. §1985(1). Because Wu was a state employee, not an officer of the United States, this Court has no subject matter jurisdiction under section 1985(1).

To the extent Yu intends to bring a conspiracy claim under 42 U.S.C. §1985(3), Defendants are immune from suit. Section 1985(3) prevents people from conspiring to deprive any person or class of persons of equal protection of the laws or privileges and immunities of the laws. See 42 U.S.C. §1985(3). As the Court found Defendants are immune from suit under section 1983, it likewise finds they are immune

from suit under section 1985[4]. *See, e.g., Southward v. Texas Bd. of Crim. Justice,* 114 F.3d 539, 554-55 (5th Cir. 1997).

V. State Tort Claims

Yu also alleges Defendants committed various intentional torts, including intentional infliction of emotional distress, invasion of privacy, and defamation. Defendants claim they are immune to suit under state common law under the Eleventh Amendment. The Court's finding of immunity extends to state tort claims brought in federal court as well as claims under federal law. One exception to the doctrine of sovereign immunity arises when a state consents to suit. *See Port Authority Trans-Hudson Corp. v. Feeney,* 495 U.S. 299, 304-05 (1990). The state of Texas consented to certain tort lawsuits in the Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code Ann. §100.001 et seq. Under the Tort Claims Act, a government entity protected by sovereign immunity waives its immunity in the limited instances enumerated in the Act. *See Poncar v. City of Mission*, 797 S.W.2d 236, 239 (Tex.App.-Corpus Christi 1990, no writ). However, in the Tort Claims Act, states only consented to suits brought in state court, not federal court. *See Sherwinski v. Peterson*, 98 F.3d 849, 851-52 (5th Cir. 1996)("[W]e find that the [Texas Tort Claims Act] waives sovereign immunity in state court only. This is the only reasonable construction of the statute. The Act clearly does not waive Eleventh Amendment immunity to suit in federal courts."). Additionally, the Act

---

[4] Even if Defendants were not immune from suit, Yu has not stated a claim upon which relief can be granted under 42 U.S.C. § 1985(3). To state a claim under section 1985(3), Yu must allege (1) a racial or class-based animus motivated the conspiracy and (2) the conspiracy aimed to violate rights protected against private infringement. See Horaist v. Doctors' Hosp. of Opelousas, 255 F.3d 261, 270 (5th Cir. 2001); Kimble v. D.J. McDuffy, Inc., 648 F.2d 340, 345 (5th Cir. 1981). While Yu has arguably claimed Defendants discriminated against Wu on the basis of his national origin, she has not alleged Defendants discriminate against Chinese employees as a class.

does not waive immunity for claims arising out of intentional torts. See Tex. Civ. Prac. & Rem. Code Ann. 101.057. Thus, the state has not waived its immunity from intentional tort claims brought in federal court, and this Court has no jurisdiction over Yu's tort claims against TXDOT and Herrera and Holtz, acting in their official capacities.

In accordance with the foregoing:

IT IS HEREBY ORDERED that Defendants' Motion to dismiss [#3] is GRANTED;

IT IS FURTHER ORDERED that Yu's claims against Herrera and Holtz in their official capacities and all of Yu's claims against the Texas Department of Transportation are DISMISSED for failure of subject matter jurisdiction.

SIGNED this the 7th day of January 2002.

Signature
SAM SPARKS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LI YU, ADMINISTRATOR OF
ESTATE OF WEI Y. WU,

"FILED"
Seal
2002 AU-2 PM 4:09

vs.

No. A-01-CA-741 SS

TEXAS DEPARTMENT OF
TRANSPORTATION, CAROLINE
HERRERA, KATHERINE HOLTZ

ORDER OF DISMISSAL

BE IT REMEMBERED on the 2nd day of August 2002 the Court called the above-styled cause for docket call, and Defendants Herrera and Holtz appeared through counsel of record. The Plaintiff, Li Yu, failed to appear, despite this Court's order of january 14, 2002, July 18, 2002, and July 29, 2002 notifying the partied of the date, time and location of docket call and setting the jury trial to begin August 5, 2002. The Plaintiff did not provide the Court or opposing counsel any reason for her failure to appear. The Clerk of the Court attempted to call Plaintiff on the telephone at the number Plaintiff provided in her pleadings, but no one answered the phone.[1] Upon Plaintiff's failure to appear, the Defendants moved to dismiss the complaint. Finding the Plaintiff received notice of docket call and failed to appear without good cause, the Court dismisses this case for want of prosecution

---

[1] In fact, the Court and Court Clerk's attempts to contact Plaintiff by telephone and through the mail in the months since she filed this lawsuit have proven futile.

pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. Accordingly, the Court enters the following order:

IT IS ORDERED that Plaintiff Li Yu's claims against Defendants Caroline Herrera and Katherine Holtz, in their individual capacities, are DISMISSED WITH PREJUDICE pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. Each party shall bear its own costs.

SIGNED this the 2nd day of August 2002.

Signature
SAM SPARKS
UNITED STATES DISTRICT JUDGE